

35th Annual Immigration & Naturalization Institute

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MERGERS & ACQUISITIONS UPDATE

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SUMMARY

This article is a only snapshot of the current state of law, regulation and secondary authority on the impact of mergers, acquisitions and the various forms of corporate restructuring on a U.S. employer's ability to retain its nonimmigrant alien workers. In order to maintain their visa status and employment authorization in the short term, the employer must review the files of all nonimmigrant alien workers to determine how they will be impacted by the change in corporate structure or identity, if the alien will remain eligible for the same visa classification after the change takes place, whether an amended petition needs to be filed, whether additional documents need to be retained in a public access file, and whether the alien will need new documents in order to travel abroad and return to the U.S.

Where the new employing entity explicitly assumes the immigration-related liabilities and obligations of the originally approved employer as a successor-in-interest to these obligations, the change in corporate identity or structure by itself will not require the filing of amended petitions for nonimmigrant workers in H-1B, H-3, J-1, O-1 and TN classification, but public access files will need to be updated for H-1B workers, and the employer will have to review separately the impact of individual changes to the alien's job regardless of their visa classification. E and L nonimmigrants are more likely to become ineligible, or to require amended petitions or new applications, as their visa eligibility is intrinsically dependent on the ownership, control, and structure of the U.S. entity that employs them.

Because INS standards differ in the immigrant visa context, the validity of any pending or previously-approved labor certification applications and petitions for immigrant visa classification must be reviewed separately to determine whether and how the new entity can continue to sponsor the alien for permanent residence, which is likely to require the filing of an amended immigrant visa petition.

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Table of Contents

I. INTRODUCTION	7
A. I-9 Documentation.....	8
II. PRESERVING NONIMMIGRANT STATUS.....	9
A. INS Memoranda and Advisory Letters on the M&A topic.....	13
B. H-1B professionals	17
C. Other H workers/H-3 Trainees.....	23
D. E-1 Treaty Traders.....	25
E. E-2 Treaty Investors.....	25
F. L-1 Intracompany Transferees.....	27
G. F-1 Students with EAD.....	29
H. J-1 exchange visitors	30
I. O-1 aliens of extraordinary ability	31
J. TN professionals under NAFTA	32
III. PRESERVING LABOR CERTIFICATION AND I-140 VALIDITY.....	33
A. Labor Certifications	34
B. E11 - Aliens of Extraordinary Ability.....	35
C. E12 - Outstanding Researchers & Professors.....	36
D. E13 - Multinational Managers & Executives.....	37
E. E21 - Regular National Interest Waivers	37
F. E21 - Physician National Interest Waivers	38
IV. PREPARING THE ALIEN FOR TRAVEL	38
V. CONCLUSION	41

I. INTRODUCTION

This article is intended to give an updated overview of how mergers and acquisitions affect alien employees, and a practical roadmap for handling changes in a U.S. employer's ownership or corporate structure. As many commentators have lamented over the years, immigration lawyers are all too often called upon to advise a corporate client on the effects of such changes after the fact, when it is a done deal and some of the company's nonimmigrant employees may have already fallen out of status.

Clients often want to know, what is the impact of proposed changes in corporate structure or identity on the company's alien employees? Unfortunately, there is no simple bright-line test, and the answer to this question will often hinge upon whether the employing entity that results from a corporate change in ownership or identity is a "new employer" or a "successor-in-interest." Since most employment-based nonimmigrant visa categories only grant the alien authorization to work for one specific company, a "new employer" will be required to file a petition with the Immigration & Naturalization Service (INS) or in some cases have the alien make a new application at a U.S. consulate or border post. A U.S. entity that becomes the alien's employer as a result of a merger or acquisition may not have to make such a filing if it can demonstrate that it is a "successor-in-interest" that has effectively assumed the immigration-related rights, obligations and liabilities of the originally approved employer. As the impact of any corporate change will always depend on the alien worker's visa status, this article is divided into subsections dealing with the different visa categories.

Once the impact of a corporate transaction on the company's nonimmigrant employees is known, there are the practical questions of who must be notified of such changes, with what documentation, and when? Since documentation may be required by the INS, the Department of Labor (DOL), or both, this article will address when amended filings are required by the INS and by the DOL, what documents to prepare and retain where something less than an amended filing is required, and when to give formal notice of a corporate change to the alien, to facilitate travel or visa issuance.

For purposes of this article, the phrase "changes in corporate ownership or identity" will serve as shorthand for the infinite variety of changes in corporate ownership, identity and organizational structure which may result from mergers, acquisitions, spin-offs, asset purchases, stock purchases, reorganizations, etc. A thorough discussion of the most common types of these transactions is beyond the scope of this article, which will only examine the effects of the transaction as they relate to maintenance of status and work authorization for alien employees in each visa category.

A. I-9 DOCUMENTATION

The regulations on employment eligibility verification allow a related, spin-off, successor company or reorganized employer that results from a restructuring, merger, stock or asset purchase to meet its I-9 obligations by maintaining the I-9 files inherited from the previous employing entity, rather than requiring the completion of new I-9s for all inherited employees.¹ However, that provision only serves to protect the successor entity against employer sanctions for any

¹ 8 CFR §274a.2(b)(1)(viii)(A)(7)

paperwork violations relating to the inherited employees.² It does not constitute an affirmative grant of employment authorization.

The key concern for the employer is ensuring that the inherited nonimmigrant employees maintain their status, which leads back to an examination of each alien worker's visa status. As discussed in greater detail in a panel discussion held on June 15, 2000, and reprinted in two parts in Bender's Immigration Bulletin³, since most nonimmigrant visa classifications are employer-specific, and the eligibility requirements for each visa category are different, the employer and counsel need to conduct a thorough immigration audit prior to a merger, acquisition, or other contemplated transaction, to assess the nonimmigrant employees in groups, by visa category. Once a worker's nonimmigrant status has been safeguarded for the short-term, the impact of the corporate change on that worker must then be reviewed for its long-term effects, to determine how, and if it is possible, to preserve the viability of any labor certification application or immigrant visa petition filed on behalf of that worker.

II. PRESERVING NONIMMIGRANT STATUS

Recent statutory additions have brought some concrete improvements, at least to H-1B nonimmigrants, in the form

² Ibid.

³ "It Ain't Over 'Till It's Over: Immigration Strategies in Mergers, Acquisitions and Other Corporate Changes," Bender's Immigration Bulletin, Vol. 5, No. 19 (Oct. 1, 2000) & Vol. 5, No. 20 (October 15, 2000), with Angelo Paparelli, Alan Tafapolsky, Ted Chiappari, Susan Cohen, and Stephen Yale-Loehr

of new sections INA §214(m)(1)⁴, authorizing portability for workers in H-1B status, and INA §214(c)(10)⁵, which provides that changes to the corporate entity will not require an amended H-1B petition, if the new employing entity succeeds to the interests and obligations of the predecessor. Amended petitions will still be required in situations where the new entity does not explicitly assume all immigration-related liabilities and obligations of the original petitioner.

INA §214(m)(1)

“(m)(1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a). Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.”

INA §214(c)(10)

“An amended H-1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to merger, acquisition or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner.”

A concept that has long been present in the INS regulations, but is not formally and consistently defined therein, is the “material” or in some cases “substantive” change. This is a

⁴ Added by Section 105(a) of the American Competitiveness in the Twenty-First Century Act of 2000, 114 Stat. 1251, P.L. 106-313, enacted Oct. 17, 2000.

⁵ Added by Section 401 of the Visa Waiver Permanent Provision Act, P.L. 106-396, enacted October 30, 2000.

common benchmark of when an amended petition must be filed.⁶ In most employment-based visa categories, normal incremental changes in the upward direction such as getting a promotion, a raise, or moving to a new office nearby are usually not deemed material, but lateral changes such as switching to a new job function in a different department, and downward adjustments such as salary reductions, are usually material. This article will address the circumstances and visa categories under which a change to the corporate entity as a whole may be deemed material to the alien worker's maintenance of status and his or her continued eligibility for that visa classification.

8 CFR §214.2(h)(2)(i)(D) *Change of employers.*

“If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States.... The alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H-1C nonimmigrant alien may not change employers.”

This sounds clear enough at first: where an entity is a “new employer,” the entity must file a new petition, and cannot employ the alien until the petition is approved.

However, no allowance or exception is made in this section for H-1B nonimmigrants commencing new employment with a subsequent employer under the “portability” provision authorized by statute, which clearly prevails.

While 8 CFR §214.2(h)(2)(i)(D) may cause some confusion because it states that employment is not authorized under conditions where the statute explicitly provides for work authorization, the mechanics of documenting work authorization for H-1B workers who take advantage of the portability provision will presumably get ironed out in future

⁶ 8 CFR §214.2(h)(2)(i)(E), 8 CFR §214.2(e)(8), 8 CFR §214.2(i)(7)(i)(C), 8 CFR §214.2(o)(i)(D)

amendments, either to this section of the regulations or to 8 CFR §274a.12(b). In the meantime, employers should treat I-9 documentation of these workers as they would an H-1B extension, retaining a copy of the alien's most current I-94 at the time of filing, and the INS receipt for the new petition.

8 CFR §214.2(h)(2)(i)(E) *Amended or new petition.*

"The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application."

Note that 8 CFR §214.2(h)(2)(i)(E) requires the filing of an "amended or new petition," apparently leaving it up to the petitioner to elect which of the two is appropriate. Following the imposition of additional fees authorized by the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA")⁷, this choice now makes a huge difference in the context of H-1B petitions, because a new petition incurs the \$1,000 worker training fee⁸, but an amended petition does not, so long as it does not also request an extension of stay beyond the dates of the previously approved petition.

⁷ Enacted Oct. 21, 1998, and contained in title IV, Division C of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, P.L. 105-277. Section 414 of ACWIA authorizes a \$500 fee. The fee was increased to \$1,000 upon enactment of AC21 on Oct. 17, 2000, with an effective date of December 17, 2000.

⁸ According to the enabling legislation at Section 414, these fees are intended to fund grants to U.S. workers from the National Science Foundation and technology skills training programs administered by the Department of Labor.

Another critical distinction between the "new" and "amended" petition, where one or the other must be filed because the new entity has not agreed to assume all the original employer's obligations but has assumed certain nonimmigrant employees, is that the filing of an amended petition automatically continues the employee's work authorization during the pendency of that petition for up to 240 days⁹ whereas the filing of a new petition does not. (See further discussion below on work authorization during the pendency of amended petitions, under the H-1B heading). This covers all nonimmigrant workers, and while it is no longer as important as it used to be for H-1B workers, who are covered by the portability provision of AC21 §105, it remains a key consideration when filing amended petitions for employees in H-2 or H-3, E, L or O status.

A. MEMORANDA AND ADVISORY LETTERS FROM INS ON THE M&A TOPIC

The earliest formal guidelines issued by INS on when new or amended petitions should be filed for H and L nonimmigrants came in the form of a 1992 memorandum from James Hogan, Executive Associate Commissioner for Operations. This memo (hereinafter, "the Hogan memo") contains vague and contradictory language, e.g., "When a beneficiary is transferred from a firm to another firm within the same organization, a new or amended petition should be filed if the new firm becomes the beneficiary's employer."¹⁰ Later on, the same memo says:

⁹ 8 CFR §274a.12(b)(20)

¹⁰ INS Central Office memorandum "Guidelines for the Filing of Amended H and L Petitions," CO 214h- C/CO 214l - C, from James J. Hogan, Executive Associate Commissioner, Operations (October 22, 1992), reprinted at 69 Interpreter Releases 1448-1450, App. II, Nov. 9, 1992.

"Changes in the ownership structure of the petitioning entity do not require the filing of a new or amended petition. It is understood that the new owner(s) of the firm assumes the previous owner's liabilities which would include the assertions the prior owner made on the labor condition application.

When the beneficiary's employer merges with another firm to create a third entity which will subsequently employ the beneficiary, a new or amended petition must be filed since the merger has created a new legal entity."¹¹

The Hogan memo was recapped in 1996 in the form of a policy memorandum from Executive Associate Commissioner T. Alexander Aleinikoff,¹² using substantially the same language and leaving its inherent contradictions unresolved.

In the immigrant visa context, a policy-designated December 1993 memorandum from Acting Executive Commissioner James Puleo (hereinafter "the Puleo memo") reaffirmed an extremely burdensome precedent case, Matter of Dial Auto Repair Shop Inc., 19 I&N Dec. 481 (Comm. 1981), stating that for an I-140 or labor certification to remain valid following a change in ownership, merger, or purchase, the successor company must file a new I-140 petition, and must document that it has assumed *all* the rights, duties, obligations and assets of the original petitioner. The new entity must continue to run the same type of business, and must re-establish its ability to pay the prevailing wage. A petitioner that is the same entity and has merely changed its

¹¹ Id., at 1449.

¹² INS Central Office memorandum "Amended H-1B Petitions," HQ 70/6.2.8-P. from Executive Associate Commissioner T. Alexander Aleinikoff (August 22, 1996) reprinted at 73 Interpreter Releases 1231-1232, App. III, Sept. 16, 1996.

corporate name is also required to file a new I-140. Any change of location outside the original petitioner's Metropolitan Statistical Area may also invalidate the underlying labor certification.¹³

A 2001 update on mergers and acquisitions by Angelo Paparelli and Susan K. Wehrer¹⁴ noted that the DOL has "freed itself from the yoke of *Dial Auto Repair*,"¹⁵ per the Final Rule where they state that a new entity must accept "all obligations, liability and undertakings under the LCAs"¹⁶, as opposed to all obligations of any kind.

So has the INS, according to an opinion letter from Efrén Hernandez, Director of Business and Trade Services, to then-AILA President Steven M. Ladik. The informal opinion letter from Mr. Hernandez carries less force than a policy-designated memorandum, but it claims, "the INS has consistently interpreted this requirement [the amended petition requirement for material changes in H employment at 8 CFR §214.2(h)(2)(i)(E)] to mean that where a second entity assumes substantially all of the assets and liabilities of the first entity, amended petitions are not required. We have also stated both at conferences and in correspondence that the assumption of liabilities refers to immigration-related liabilities, such as LCA obligations and violations thereof. It does not refer to non-immigration related obligations and liabilities, such as environmental or tort obligations, for example... the recent legislation amending section 214(c) of

¹³ INS Central Office memorandum, "Amendment of Labor Certifications in I-140 Petitions," HQ 204.24-P, HW 204.25-P. by James Puleo, Acting Executive Commissioner (Dec. 10, 1993), reprinted at 70 Interpreter Releases 1692-1693, App. III (Dec. 20, 1993)

¹⁴ "Update on Mergers and Acquisitions: Congress Toys with the H-1B," A. Paparelli & S.K. Wehrer, 78 Interpreter Releases 1401 (Aug. 31, 2001), and AILA 2001-2002 Immigration & Nationality Law Handbook, Vol. II, p.1 (AILA 2001)

¹⁵ Id. At 1404.

¹⁶ 65 Fed. Reg. 80232 (Dec. 20, 2000).

the INA merely amplifies the fact that a merger, acquisition, or consolidation does not automatically create material changes to the terms and condition of the employment and is consistent with INS interpretations in this area."¹⁷

As noted by Laurie Grossman and Susan Cohen,¹⁸ practitioners should exercise caution when relying on any INS memoranda or opinion letters that are unclassified or bear a 'C' code, which means that INS Headquarters classifies them as correspondence, and therefore not binding on the Service. Of the memoranda and letters cited herein, only the Aleinikoff and Puleo memoranda carry a 'P' code, designating them as "policy" documents and thus intended as binding. Even those designations may no longer carry the weight they once did - in the wake of the immigrant investor decisions¹⁹, it has become clear that INS regards few of its prior pronouncements as binding, not even the advisory opinions of INS General Counsel.

It is unclear how much weight to accord the Puleo memo at this point. While Mr. Hernandez claimed that INS now recognizes a much more relaxed standard, his letter did not have a policy designation, and only explicitly addressed the status of H-1B nonimmigrants. No regulations or documents designated as binding policy statements about successors-in-interest in the I-140 context have been issued that specifically supercede the Puleo memo. Proceed with caution.

¹⁷ Letter of Efrén Hernandez III, Director, INS Business & Trade Services, to Steven M. Ladik, HQ 70/6.2.8 (March 22, 2001), reprinted at 78 Int. Rel. 621, App. III (Apr. 2, 2001).

¹⁸ "The Effect of Changed Circumstances on H-1B Nonimmigrant Workers," L. Grossman & S. Cohen, AILA 1997-1998 Immigration & Nationality Law Handbook, Vol. II, p. 191 (AILA 1997).

¹⁹ *Matter of Izumii*, 22 I&N Dec. ___, 19 Immig. Rep. B2-32 (Int. Dec. 3361, Assoc. Comm'r, July 13, 1998), et al.

B. H-1B PROFESSIONALS

The INS has acknowledged at least since 1993 that no new or amended petition is required where a new employer is a successor-in-interest to the original petitioning employer, per an August 1993 letter of Jacqueline Bednarz, Chief of Nonimmigrant Adjudications, to attorney Mark Bravin (hereinafter "the Bednarz letter").²⁰ However, there has been considerable confusion over what will satisfy the INS that a second entity is a successor-in-interest. Ms. Bednarz specifically addressed the situation where company A purchases "a substantial amount" of the assets of company B, and assumes the employees of company B affected by the asset purchase, acknowledging, "In this scenario, the Service recognizes the concept of successor-in-interest." However, the Bednarz letter remained silent as to whether this pronouncement would also apply to the validity of an I-140 immigrant visa petition filed by company B. The question of what suffices to establish a successor-in-interest in the immigrant visa context has never been harmonized with the guidance for H-1Bs.

With respect to amended petitions and when employment under the new terms is authorized, the Bednarz letter stated unequivocally, "it must be adjudicated prior to the alien commencing employment under the terms of the amended petition." By late 1995, the business realities of this pronouncement had sunk in and its author had been succeeded as Chief of Nonimmigrant Adjudications by Yvonne M. LaFleur, who wrote to attorney Susan Cohen, "[T]here is nothing in the current regulation which specifies when the amended petition should be filed. Therefore a petitioner would not be penalized for filing an amended

²⁰ Letter from Jacqueline A. Bednarz, Chief, Nonimmigrant Branch, Adjudications, to Mark Bravin (September 10, 1993) reprinted at 70 Interpreter Releases 1573-1574, App. I (Nov. 22, 1993)

petition after the occurrence of the material change.”²¹ She elaborated further on this idea, covering change of locations, in a subsequent letter to Richard D. Steel, in which she said, “While the regulation requires the employer to file an amended H-1B petition where there has been a material change in circumstances, the regulation does not require that the alien wait for the approval of the amended petition. While the Service would prefer the alien to remain at the first location until such time as the amended petition is approved, it is recognized, from a business perspective, that this may not be a reasonable position in all situations. Therefore, it is the opinion of this office that the alien may transfer to the new location prior to the approval of the amended petition.”²²

The statute was only changed to recognize a policy of not requiring amended H-1B petitions in successor-in-interest situations as of October 30, 2000. As yet, INS regulations have not established any set procedures for the employer to follow where an amended petition is not required, in order to establish that the new entity is in fact a successor-in-interest. The Hernandez letter recommends filing amended petitions even where they are not required, for those aliens who need to travel, so that they will have a new approval notice bearing the changed entity name. The Department of Labor has been happy to step up and fill this gap.

Since enactment of updated DOL regulations governing the H-1B program in December 2000, where a change in corporate structure does not materially change the location or job description of the H-1B nonimmigrant employees,

²¹ Letter of Yvonne M. LaFleur, Chief, Nonimmigrant Branch, Adjudications, to Susan J. Cohen, HQ 214h-C (October 12, 1995) reprinted at 72 Interpreter Releases 1600, App. VII (Nov. 20, 1995)

²² Letter of Yvonne M. LaFleur, Chief, Nonimmigrant Branch, Adjudications, to Richard D. Steel (November 29, 1995) reprinted in AILA Monthly Mailing, Vol. 15, No. 2, at 91 (February 1996)

and the new entity expressly agrees to assume the predecessor's LCA obligations, no new LCAs or amended petitions need be filed. This is a welcome change from the previous rule, which required the filing of a new Labor Condition Application (“LCA”) and thus also a new or amended petition to INS, any time a corporate entity changed its federal Employer Identification Number. However, the DOL still requires timely recordkeeping in the form of amendments to the public access files, before the corporate change takes effect.

Amended regulations from the Department of Labor, governing the H-1B program and implementing the changes dictated by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) were published in the Federal Register on December 20, 2000. The introductory portion of the notice, at 65 F.R. 80112, states:

“Documentation of Corporate Identity. (§655.760)... DOL's Interim Final Rule provides that a new LCA will not be required merely because a corporate reorganization results in a change of corporate identity, regardless of whether there is a change in the EIN and regardless of whether the IRS definition of single employer is satisfied, provided that the successor entity, *prior* to the continued employment of the H-1B nonimmigrant, agrees to assume the predecessor entity's obligations and liabilities under the LCA. The agreement to comply with the LCA for the future and to any liability of the predecessor under the LCA must be documented with a memorandum in the public access file.” (emphasis added)

Per 65 F.R. 80213, the regulation at 20 CFR §655.760, governing public access files, has been amended at subsection 655.760(a)(7) to read as follows:

“(7) Where the employer undergoes a change in corporate structure, a sworn statement by a responsible official of the new employing entity that it accepts all obligations, liabilities and undertakings under the LCAs filed by the predecessor employing entity, together with a list of each affected LCA and its date of certification, and a description of the actual wage system and EIN of the new employing entity (see Sec. 655.730 (e)(1)).”

The cross-referenced section, 20 CFR §655.730, details procedures for filing LCAs, and further specifies at subsection (e)(1), in pertinent part:

“[T]he new employing entity is not required to file new LCAs and H-1B petitions ... (regardless of whether there is a change in the ... (EIN)), provided that the new employing entity maintains in its records a list of the H-1B nonimmigrants transferred to ... the new employing entity, and maintains in the public access file(s) ... a document containing all of the following:

- (i) Each affected LCA number and its date of certification;
- (ii) A description of the new employing entity's actual wage system applicable to H-1B nonimmigrant(s) who become employees of the new employing entity;
- (iii) The employer identification number (EIN) of the new employing entity (whether or not different from that of the predecessor entity) and;
- (iv) A sworn statement by an authorized representative of the new employing entity expressly acknowledging such entity's assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective LCA filed by the predecessor entity. Unless such

statement is executed and made available in accordance with this paragraph, the new employing entity shall not employ any of the predecessor entity's H-1B nonimmigrants without filing new LCAs and petitions for such nonimmigrants. The new employing entity's statement shall include such entity's explicit agreement to:

- (A) Abide by the DOL's H-1B regulations applicable to the LCAs;
- (B) Maintain a copy of the statement in the public access file ... and
- (C) Make the document available to any member of the public or the Department upon request.”

Accordingly, under the revised DOL regulations, where the successor entity agrees to assume all LCA and immigration-related obligations and liabilities, a sworn memorandum to that effect by a responsible official of the new entity must be placed in the public access files relating to all H-1B employees before the change becomes effective, with a description of the new actual wage system, attaching a list of all the affected LCAs by number and by certification date.

If the responsible officers of the new entity have not yet been appointed, or for some other reason the memorandum with all the above-detailed attachments does not get to the public access file before the change occurs, then new LCAs should be filed, which results in a corresponding obligation to file amended petitions with INS. “The Department cautions that an employer which undergoes a change in structure and EIN, but chooses not to insert the required memorandum in the public access file is required to file new LCAs.”²³

²³ 65 Fed. Reg. 80124 (Dec. 20, 2000).

In practice, this is nonsense: if the employer does not yet have sufficient information about the successor entity to prepare a memo for the H-1B public access files, how in the world are they supposed to have sufficient data to prepare and timely file LCAs and H-1B petitions on behalf of the new entity?

Where it is not possible to execute the required memorandum and have it distributed to all H-1B public access files before the change occurs, the successor entity should file amended petitions at the earliest time possible, even if that is shortly after the new employing entity comes into being. An expedient method would be to begin with a friendly appeal to the business supervisor at the relevant INS Service Center, outlining the corporate transaction and requesting the Service's cooperation in using a single "class representative" as a feasible means of providing the Service timely notice with respect to all the affected workers. The employer can then file an amended petition for one worker, using Premium Processing to guarantee a rapid response, describing and documenting the change in the corporate entity, and attaching a list of all the affected nonimmigrant workers. As suggested by attorney Angelo Paparelli in a panel discussion reported in Bender's Immigration Bulletin,²⁴ this "class representative" strategy should be treated as a collaborative effort with the Service, with the cautionary note that some Service Centers may be more receptive to the idea than others.

Where the merger or acquisition results in changes to the job duties, location, hours or salary for specific H-1B employees, those cases must be reviewed individually to determine the need for amended petitions. Material changes to an individual worker's terms of employment still necessitate the filing of an amended LCA and amended

²⁴ "It Ain't Over 'Till It's Over..." Bender's Immigration Bulletin, Vol. 5, No. 19, pp. 800-801 (October 1, 2000)

petition, even though the corporate entity change by itself does not.

C. OTHER H WORKERS/H-3 TRAINEES

As noted above, the regulations at 8 CFR §214.2(h)(2)(E) require filing of a "new or amended" petition in any H petition where a material change occurs, with the corresponding "current or new" determination from the Labor Department. There is no required filing with the Labor Department for H-3 trainees, but H-2A and H-2B temporary workers go through a temporary labor certification process, so corporate transactions that result in changes in name or location of the H-2 employer require amended filings with DOL as well as amended petitions to INS.

Since INA §214 (c)(10) on its face only applies to H-1B nonimmigrants, even where a change in corporate structure or ownership results in a successor-in-interest, the successor entity should probably file amended petitions for H-3 and H-2 aliens. If the successor entity does not, there is no set procedure for documenting that these workers remain in status, particularly where their payroll documents abruptly change to reflect another entity name or EIN. A minimum precaution would be to put a memorandum documenting the date and nature of the corporate change and the new entity's assumption of the original petitioner's immigration and employment rights, liabilities, etc., into the I-9 and personnel files of all H nonimmigrants.

E and L employees – the most vulnerable to corporate changes

If a corporate change alters the ownership and control of the U.S. entity, or severs a relationship with a foreign parent,

affiliate or subsidiary company, then E treaty company managers and essential employees, and L-1 intracompany transferees may fall out of their nonimmigrant visa status immediately as of the effective date of the change. Unlike H-1B workers, these nonimmigrants derive their visa eligibility in part from the corporate structure or ownership of the U.S. employer, therefore changes to the entity that do not directly have any impact on their individual terms and conditions of employment may still be material to their maintenance of nonimmigrant visa status.

8 CFR §214.2(e)(8)

“(iii) *Substantive changes.* Prior Service approval must be obtained where there will be a substantive change in the terms or conditions of E status... the treaty alien must submit evidence of continued eligibility for E classification in the new capacity... The Service will deem there to have been a substantive change necessitating the filing of a new Form I-129 application where there has been a fundamental change in the employing entity’s basic characteristics, such as a merger, acquisition, or sale of the division where the alien is employed.

(iv) *Non-substantive changes.*

...prior approval is not required if corporate changes occur which do not affect the previously approved employment relationship, or are otherwise non-substantive.”

The E regulations also allow for both E-1 and E-2 treaty employees to be transferred freely between any subsidiaries of a common treaty parent enterprise, so long as the parent organization and the subsidiaries were named in the original petition or application.²⁵ This means that moving some E employees to the payroll of another U.S. entity with a different name and Employer Identification Number will not be a deemed a material or substantive change if that entity is and has been named in previous filings as part of the treaty

²⁵ 8 CFR §214.2(e)(8)(ii)

company or group. This may be a necessary strategic choice where the entity or division they have been working for becomes part of a non-treaty company.

D. E-1 TREATY TRADERS

E-1 Treaty trader eligibility derives from the U.S. employer being principally engaged in substantial international trade with the treaty country,²⁶ and on the company and the alien worker both having the nationality of the treaty country²⁷. In order for these employees to maintain status, the ownership of the U.S. employer needs to remain at least 50% in the hands of nationals of the treaty country²⁸, and the company must maintain a level of international trade with the treaty country that still constitutes over 50% of its international trade.²⁹

If a corporate change in structure or ownership leaves the treaty nationality of the company intact, it may still qualify, but will require amended petitions if the ownership of the U.S. entity shifts outside the bounds of the previously-approved parent group or enterprise. If it results in the alien being employed by any subsidiary of the parent or group enterprise named in the original application, it is deemed a “non-substantive” change and the only remaining concern with respect to continued work authorization of the E-1 employees is the whether the U.S. entity is sustaining its principal trade with the treaty country.

E. E-2 TREATY INVESTORS

²⁶ INA §101(a)(15)(E)(i)

²⁷ INA §101(a)(15)(E)(i), 8 CFR §214.2(e)(1)(i)

²⁸ 8 CFR §214.2(e)(3)(ii)

²⁹ 8 CFR §214.2(e)(11)

E-2 Treaty investor eligibility derives from an individual or corporation which has the nationality of the treaty country investing a substantial amount of capital in the United States.³⁰ Since most criteria for eligibility relate to the nature and application of the investment, the ongoing work and authorization of E-2 employees depends on maintaining the treaty-country ownership of the enterprise in the U.S., and whether the treaty-country owner is part of the originally-approved parent group or enterprise (in which case it is non-substantive and no amendments are required), or shifts to new owners outside that group (in which case amended petitions are required).

Executive, managerial and essential employees of E-1 treaty trader and E-2 treaty investor companies will lose status as of the date of the change if the U.S. treaty company will suffer a change of nationality because majority ownership and control of the U.S. entity shifts out of the hands of nationals of the treaty country.

In situations where the U.S. entity is involved in a corporate entity change that does not require an amended petition, and the E employees need to travel, the E regulations leave a lot of room for choice on the part of the employer.

8 CFR §214.2(e)(8)(iv)

"...To facilitate admission, the alien may:

- (A) Present a letter from the treaty-qualifying company through which the alien attained E classification explaining the nature of the change;
- (B) Request a new Form I-797, Approval Notice, reflecting the non-substantive change by filing with the appropriate Service Center Form I-129, with fee, and a complete description of the change, or;

³⁰ INA §101(a)(15)(E)(ii)

(C) Apply directly to State for a new E visa reflecting the change. An alien who does not elect one of the three options contained in paragraph (e)(8)(iv)(A) through (C) of this section, is not precluded from demonstrating to the satisfaction of the immigration officer at the port-of-entry in some other manner, his or her admissibility under section 101(a)(15)(E) of the Act."

This is a rare instance of INS regulations formally acknowledging that the guidance they provide is unclear, and that the traveling E treaty alien may have to present persuasive documentation of a corporate change even where the employer does not.

F. L-1 INTRACOMPANY TRANSFERREES

L-1 intracompany transferees derive visa eligibility for this visa status from both the qualifying relationship between the corporate entity employing them in the U.S. and the entity where they previously worked abroad, and from the executive, managerial or specialized knowledge nature of the job with the U.S. entity.³¹ The relationship between the entities must meet one of the four regulatory definitions as parent, subsidiary, affiliate or branch office.³²

8 CFR §214.2(i)(7)(i)(C)

"*Amendments.* The petitioner shall file an amended petition, with fee, at the Service Center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition,

³¹ INA §101(a)(15)(L)

³² As defined at 8 CFR §214.2(i)(1)(ii)(I) through (L), the entities must have common ownership and control, meaning that they have in common at least 50% ownership plus veto power. If an entity is a publicly-traded company, control can be demonstrated by a less-than 50% owner that is the largest shareholder.

change in capacity of employment (i.e., from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act."

A change of job capacity from specialized knowledge to managerial or vice versa is at the individual level, and may require amended petitions, but the key question with respect to the impact of a change in corporate structure or ownership on L-1 employees is, does it change the qualifying corporate relationship with the relevant foreign entity?

The addition of a new qualifying organization to the previously approved group under a blanket L petition warrants the filing of an amended petition, but has no negative impact on the relationship with the entity where the alien's qualifying experience abroad was obtained.

Where the U.S. entity will retain some but not all foreign affiliations after the restructuring, and there are multiple foreign entities, each L-1 nonimmigrant's file must be reviewed to determine whether the new employing U.S. entity will have the same relationship as its predecessor with the foreign entity where that L-1 nonimmigrant obtained his or her qualifying work experience abroad. If the relationship with that foreign entity will be changed but not severed, an amended petition may be filed as long as the entity abroad and the U.S. employer still have one of the qualifying relationships as parent, branch, subsidiary or affiliate.

If the qualifying relationship is to be unequivocally severed, such as for all L-1 employees of a U.S. company being sold by a foreign parent company to a U.S. purchaser, then all L-1 positions and credentials must be reviewed prior to the transaction to determine eligibility for H-1B status before the restructuring occurs, to avoid having employees fall out of status on the date the change takes effect.

Some corporate changes will have the effect of changing the majority ownership and control of the U.S. entity, and also change its nationality. For example, if the original petitioner/employer is a wholly-owned U.S. subsidiary of a French company, then a proposed sale or spin-off of that entity to a U.S. company renders all E and L employees immediately out of status, because it changes the company's nationality (as determined by ownership) and also severs the qualifying relationship with a foreign parent company.

A proposed sale of the U.S. subsidiary to a new, unrelated French company would maintain the U.S. company's treaty nationality but would require amended petitions for E employees, and would still render all the L-1 transferees out of status, having severed the relationship with the entity where they obtained qualifying experience abroad.

Wherever human resources staff and/or immigration counsel see the possibility of such changes coming, the files of E and L employees should be reviewed for the possibility of filing petitions for change to H-1B status, for those who qualify.

G. F-1 STUDENTS WITH EAD

F-1 students working under optional practical training will usually remain authorized to work because their Employment Authorization Document is not employer-specific.

However, in some cases the site of the student's permitted training is named on the student's I-20, so this form should be reviewed carefully to see if the endorsement approving the practical training names the employer. If the employer is named on the I-20, and the corporate name has changed,

then the student's designated school official should be contacted to see if the DSO will make a new endorsement adding the new corporate name. In general, school officials are usually reluctant to make any changes to an I-20 after the student's date of graduation.

H. J-1 EXCHANGE VISITORS

The J-1 program sponsor designation comes from the Department of State (formerly USIA) and is valid for intervals of five years at a time. If the employing entity itself is the J-1 program sponsor and there is a change to either the corporate name or content of the program, the new entity may wish to re-designate the program so it can issue new Forms IAP-66 that reflect the new corporate data, but otherwise the program remains valid unless the Department of State actively withdraws approval for the program designation.

Even if a J-1 program is cancelled, the aliens already admitted to participate in it remain in valid status through the program dates on their Forms IAP-66, so long as their program-related activities are ongoing. 8 CFR §214.2(j)(3) says, in pertinent part:

"If the exchange visitor is currently engaged in activities authorized by the cancelled program, the participant is authorized to remain in the United States to engage in those activities until expiration of the period of stay previously authorized. The district director shall notify participants in cancelled programs that permission to remain in the United States as an exchange visitor, or extension of stay may be obtained if the participant is accepted in another approved program and a Form IAP-66, executed by the new program sponsor, is submitted. In this case, a release from the sponsor of the cancelled program will not be required."

This is not an issue for aliens whose J-1 program sponsor is an umbrella organization such as AIPT, AILF, CIP, or a country-specific umbrella-type sponsor like the Alliance Française, where the alien's Form IAP-66 will have a program description that does not name the specific employer. If the J-1 sponsor is an umbrella organization and the program activities continue, the J-1 alien is maintaining status.

Likewise, J-1 students with authorized practical training are home free because they have work authorization without the need for an Employment Authorization Document, which remains in force so long as they continue practical training in the field indicated on the Form IAP-66.

Some of these rules may change when the Department of State issues new implementing regulations for Form DS-2019, its replacement for the USIA Form IAP-66.

I. O-1 ALIENS OF EXTRAORDINARY ABILITY

Under 8 CFR §214.2(o)(i)(D), amended petitions are required "to reflect any material changes in the terms and conditions of employment or the beneficiary's eligibility."

The O regulations make no mention of changes to the employing entity, but they do further state: "In the case of a petition filed for an artist or entertainer, a petitioner may add additional performances or engagements during the validity period of the petition without filing an amended petition, provided the additional performances or engagements require an alien of O-1 caliber."

These regulations reflect that with regard to O-1 nonimmigrants, INS is more concerned about the alien's

elite qualifications and the ongoing availability of work suited to his or her extraordinary level of renown and ability, than about changes to the structure or ownership of the employing entity, which is not among the factors relating to O-1 eligibility.

As a practical matter, experience suggests that business O-1 employees of corporations that have restructured or changed hands are likely to be treated by INS as having maintained status when any evidence at all of a "successor-in-interest" relationship with respect to the company's immigration and employment obligations is included with the alien's adjustment application, or with a new petition by a different O-1 employer.

J. TN PROFESSIONALS UNDER NAFTA

Although the TN regulations at 8 CFR §214.6(d)(5) require "immediate notification" of changes in the terms and conditions of employment which may affect eligibility, and provide for revocation on notice if the petitioner violates the terms or conditions of the approved petition, it is critical to note that eligibility for TN classification does not depend in any way on the structure or ownership of the employer, so those changes do not affect the alien's continued eligibility for TN status. The terms and conditions material to TN eligibility are whether the job is one of the 63 jobs enumerated at Schedule 2 to Appendix 1603.D.1. of the North American Free Trade Agreement, and whether the alien has the required credentials for that job, as listed for each job at 8 CFR §214.6(c). TN classification does not intrinsically depend on a petition, since Canadians who qualify can apply or reapply at a border post, without ever having a petition filed on their behalf. The petition is a procedural requirement for Mexican TNs, and for Canadians

who need to extend their stay without traveling to a border post and seeking readmission.

The Jacqueline Bednarz letter of 1993 addressed the topic of successors-in-interest as it relates to TC employees,³³ noting, "it is important to underscore that the professional category under the United States-Canada Free Trade Agreement (FTA) is not a petition-driven classification... [T]here is no need to request an extension of temporary stay as TC if the only change in employment is a successor-in-interest situation."

Accordingly, if the terms and conditions of the TN employment remain unchanged and the employer is a successor-in-interest to the original employer, it appears that no documentation need be changed for the TN employees until either a petition is filed to extend their stay or until they re-apply at a border post for an additional year. At that time, it would be appropriate for the employer's letter to explain any changes to the corporate entity.

Since a petition is procedurally required for Mexican TNs, and unlike Canadians they must also obtain a visa stamp (which reflects the name of the employer), it may be prudent to consider filing amended petitions for them if the company name changes, even where this is not done for the Canadian TN employees.

III. PRESERVING LABOR CERTIFICATION AND I-140 VALIDITY

³³ "Treaty Canada" classification under the U.S.-Canada FTA (enacted in 1989) was the predecessor to the current TN visa classification under NAFTA, enacted in 1992.

The Puleo memorandum of December 1993 requires the filing of a new I-140 immigrant visa petition "if the petitioner has been bought out, merged, or had a significant change in its ownership."³⁴ It further states that the Service only recognizes a successor-in-interest where the new entity "assumes *all* of the rights, duties, obligations and assets of the original employer and continues to operate the same type of business."³⁴ (emphasis added). It also requires documentation that the new entity has the financial ability to meet the obligations undertaken in the underlying labor certification.³⁵ We may choose to rely on the non-binding March 2001 opinion letter of Mr. Hernandez, which lowers this standard to "substantially all of the assets and liabilities of the first entity," with the further limitation that this refers only to immigration-related liabilities. However, if we do rely on the assurances in the Hernandez letter, we are left with the remote but distinct possibility of an arbitrary determination that a company filing an amended immigrant visa petition does not meet the definition of a successor-in-interest, because there is no authority binding the Service to their current interpretation.

A. LABOR CERTIFICATIONS

We are stuck with the Service's right to make such arbitrary determinations in the context of deciding when a labor certification remains valid. A 1992 DOL memorandum of understanding memorializes an informal agreement between the two agencies to delegate this function to INS,³⁶ because INS has more experience determining when an employer is a successor-in-interest than the DOL does.

³⁴ Puleo memo, Supra, N.12, at 1692.

³⁵ Id. at 1693.

³⁶ Memorandum of Donald Kulick to all Regional Administrators, "Amending Certified Labor Certification Applications," reprinted at 69 Interpreter Releases 529, App. III (April 27, 1992)

As there is no separate policy guidance from INS on documenting corporate changes where an I-140 is not based on an approved labor certification, we operate under the (possibly mistaken) assumption that all the other employer-dependent immigrant visa categories will be treated similarly in the case of a merger or acquisition of the petitioning employer. This leads to a couple of sharp divides in the INS requirements, because not all of the employment-based immigrant visa categories are employer-dependent, as follows:

B. E11 - ALIENS OF EXTRAORDINARY ABILITY

No continuity of petitioner's entity need be demonstrated for aliens of extraordinary ability, regardless of whether the alien filed a self-petition, because A) per INA §203(b)(1)(A) and 8 CFR §204.5(h), no job offer is required for this category, and B) unless the petitioner has withdrawn the I-140 (or it has been automatically revoked by the original petitioner going out of business), it remains valid even if the alien intends to work for another firm, per the 1993 INS opinion letter³⁷ discussed below.

The INS regulations at 8 CFR §204.5(h) state that "neither an offer of employment nor a labor certification is required for this classification; however the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans

³⁷ Letter from INS Director of Adjudications Edward H. Skerrett to attorney Mark Nerenberg, (January 25, 1993), reprinted in AILA Monthly Mailing, Vol. 12, No. 4, at 278 (April 1993)

on how he or she intends to continue his or her work in the United States.”

The substantive issue is whether and how the alien will continue to be employed in his or her field of endeavor, continuing the same kind of work that was found to be extraordinary when the petition was adjudicated. A 1993 letter from Edward Skerrett, INS Director of Adjudications, affirmed, “an alien classifiable under 203(b)(1)(A) is not required to have a job offer or a labor certification, but must demonstrate how he or she plans to continue work in the United States. It is our opinion that the petition [filed by a prospective employer] remains valid even though the alien will not be working for the prospective employer as long as the alien can demonstrate how he plans to continue his work in the United States.”³⁸

In practice, the policy enunciated in Mr. Skerrett’s letter is widely recognized by the INS, whose Service Centers tend to accept a job offer letter from any entity in adjustment applications based on E11 cases, even where the I-140 was filed by a prior employer rather than as a self-petition. However, the Department of State’s National Visa Center and some more remote consular posts may not be as familiar with this policy, and may need to have it explained in writing. When relying on an I-140 approval from an alien’s previous employer, it is imperative to check the petition number with the relevant Service Center, to be sure that the immigrant petition has not been withdrawn.

C. E12 - OUTSTANDING RESEARCHERS & PROFESSORS

³⁸ Ibid.

An amended I-140 petition must be filed to document a successor-in-interest relationship because the specific tenure-track or equivalent job offer from the original petitioner is required, and the petitioner must still be either a university, or a private company with a three full-time research staff of at least 3 individuals and a documented record of achievement in the relevant academic field, per INA §203(b)(1)(B), and 8 CFR §204.5(i).

D. E13 - MULTINATIONAL MANAGERS & EXECUTIVES

An amended I-140 must be filed showing the successor-in-interest relationship, and must also demonstrate that the employing entity retains a relationship of common ownership and control with the entity abroad where alien obtained his or her qualifying experience prior to entering the United States, per INA §203(b)(1)(C) and 8 CFR §204.5(j). If that qualifying corporate relationship is severed, so is the alien’s eligibility for this immigrant visa category.

E. E21 - REGULAR NATIONAL INTEREST WAIVERS

Like the E11 category, no continuity of the employing entity is required for regular “national interest waiver” cases under INA §203(b)(2)(i). Where the labor certification requirement is waived because the alien’s work is deemed to be in the national interest, the job offer requirement is also waived.³⁹ Likewise, the issue of concern to the Service is whether the alien can show that he or she will continue to do the type of work that was found to be in the national interest of the United States. However, the scope of the alien’s field

³⁹ 8 CFR §204.5(k)(4)(ii)

of endeavor has on occasion been construed quite narrowly by INS, so it is important to ensure that the particular type of work the alien was engaged in will be continued under the new corporate regime.

F. E21 - PHYSICIAN NATIONAL INTEREST WAIVERS

There is also the narrower "national interest waiver" specific to physicians under INA §203(b)(2)(B)(ii), which entails a 5-year contractual commitment to work as a primary care physician in a Health Professional Shortage Area or VA facility. A change of employer for the physician fulfilling his commitment under this section will only be permitted where INS finds extenuating circumstances beyond the doctor's control, such as the initial sponsoring facility going out of business. Thus, under new INA §214(c)(10), a merger or takeover of the sponsoring facility before the physician's five-year commitment is complete might not require an amended H-1B petition, provided the facility's location and HPSA designation remained the same. However, upon completion of the 5 years, the I-140 petition would have to include "successor-in-interest" evidence to show that the physician fulfilled his original contract obligation to the sponsoring healthcare facility.

IV. PREPARING THE ALIEN FOR TRAVEL

Travel for H-1B nonimmigrants who have a petition pending by a new employer is now specifically authorized under the portability rules of AC21, per an INS directive of January

29, 2001.⁴⁰ Clearly, this provision would also cover amended petitions reflecting a change of name and structure by a previously-approved employer.

To gain readmission in this situation, the alien must:

Be otherwise admissible

Have an unexpired passport and H-1B visa showing prior petitioner

Show that he/she was previously admitted as H-1B or

accorded C/S to H-1B, and

Show evidence of timely filing by new petitioner (preferably the INS receipt notice, but the overnight courier tracking slip, with INS delivery data, will do in a pinch)

For advising the H-1B nonimmigrant on travel abroad, where there has been a corporate change that did not require filing of a new petition, but the current employer's name is different, in the wake of INA §214(c)(10), you may want to advise the alien (or advise Human Resources to tell the alien) to travel with copies of:

1. Public access file memo, and,
2. Letter from the successor entity, directed to that specific alien, confirming that this entity now employs him or her as successor to previous petitioner, and briefly describing the change of entity.

For nonimmigrant alien workers other than H-1Bs, there is no portability, so if a new or amended petition is required, then the alien must stay in the U.S. at least until it is approved. Thereafter, the alien can re-enter on an old visa showing the previous entity as employer, relying on the 1997 INS memo that says H, L, O and P nonimmigrants can

⁴⁰ INS Headquarters Memorandum, "Interim Guidance for Processing H-1B Applicants for Admission...", HQOPS 70/20 (January 29, 2001), reprinted at 78 Interpreter Releases 381, App. I (Feb. 12, 2001)

travel on any still-valid visa in the same classification with evidence of approval to work for a different employer.⁴¹

E nonimmigrants whose employer has had a "substantive change" will eventually have to make a *de novo* application at a consulate, but in the short term they are free to try their luck at a port-of-entry. Otherwise, E aliens may attempt to apply for a new visa reflecting the new corporate name through revalidation by the State Department. Stateside revalidation is a process whose results have become increasingly uncertain, and definitely inadvisable for any nationals of the "state sponsors of terrorism" countries⁴² and nationals of (or people born in) any of 26 countries⁴³, who are likely to have their fee checks cashed only to receive a denial based on INA §221(g) some eight weeks or more later, only to pay the same fees and wait all over again in their home country. As noted above, the E visa regulations at 8 CFR §214.2(e)(8)(iv) contemplate a wide array of permissible options. If the treaty company does not wish to file an amended petition, request an amended approval notice, or send the alien back to the consulate in the treaty country, the E employee who travels after a change to the corporate ownership or entity can present essentially any persuasive documentation at a port of entry. The advisability of this strategy will depend in part on the strength and simplicity of the employer's letter, and in part on the alien's temperament and English-language fluency.

⁴¹ INS Headquarters Memorandum "Validity of Certain Nonimmigrant Visas," HQBEN (July 8, 1997) from Michael L. Aytes, Assistant Commissioner, reprinted at 74 Interpreter Releases 1459, App. VII (Sept. 22, 1997).

⁴² Cuba, Iraq, Iran, Libya, North Korea, Sudan, Syria.

⁴³ Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, Yemen. This list is presently based on conjecture & the collective practical experience of AILA attorneys, as this is no longer information the Department of State makes available to the public.

Canadian TN employees are not petition-dependent and can continue to travel on their valid I-94 for the duration of the one-year period authorized. Since Mexican TNs are actually issued a visa stamp that may have the old entity name on its face, they can either travel with a letter from the company explaining the corporate change and how it has no impact on the individual's TN eligibility, or the employer may choose to file amended petitions right away, possibly via a single "class representative" petition, using Premium Processing if necessary, so that those Mexican TN employees can travel with a new approval notice.

V. CONCLUSION

INS has not harmonized its nonimmigrant policies with respect to mergers and acquisitions with its immigrant policies in this area, which may in practice be similar but have not been confirmed by regulation or policy documents in nearly a decade. The Service has devoted far more attention to the fate of H-1B workers than to any other nonimmigrants, but this is appropriate to their relative numbers. INS and DOL policy are not actively in conflict at this point, but leave significant room for doubt about the best course of action in certain situations, notably where the immigration-related impact of a corporate change cannot be documented before it has happened. Nonimmigrant aliens who travel abroad in the wake of a corporate restructuring bear a heavy evidentiary burden, as they may not be beneficiaries of amended petitions, and may be ill-prepared to explain the alternative documentation even if it is provided to them by the employer.